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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 120.

RITA GOTTESMAN, MARIE MATTIELLO and PAUL J. PEYSER,

Petitioners,

v.

GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS AND COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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GENERAL MOTORS CORPORATION and E. I. DU PONT DE NEMOURS AND COMPANY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioners Gottesman *et al.* pray that this Court grant rehearing of its order of October 19, 1964 denying the petition for a writ of certiorari, and that this Court postpone determination of this petition for rehearing until consideration on the merits of *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.* (No. 291, October Term 1964) and thereafter that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in this case as prayed for in the petition filed May 27, 1964 herein.

Reasons for Granting Rehearing, Postponing Consideration, and Issuing the Writ.

This petition is made pursuant to Rule 58 (2) of the Rules of this Court and is confined to the grounds thereof.

The granting of certiorari in the *Minnesota Mining and Manufacturing Co.* (hereafter called "3M") case, No. 291, constitutes an intervening circumstance which is both substantial and controlling. The fact that this Court in granting certiorari in that case stated:

> "The Solicitor General is invited to file a brief expressing the views of the United States."

reflects the importance which this Court has already attached to the underlying issue in that case, which is even more sharply presented in this Gottesman suit.

New Jersey Wood Finishing Co. alleges in the "Second Count" of its amended complaint in the 3M case as follows (55a, Third Circuit Appendix):

> "3. The effect of the aforesaid acquisition, set forth more particularly in Paragraphs 5, 6, 7 and 8 of the First Count was substantially to lessen competition and to tend to create a monopoly in violation of Section 7 of the Clayton Act.
>
> "4. As a result of the aforesaid violation of the Clayton Act plaintiff suffered damage and injury."

In the case at bar, the decision of the District Judge herein holds (A-27 of Petition, No. 120, October Term, 1964):

> "(4) Plaintiffs' claims under Section 7 of the Clayton Act do not constitute a basis for either injunctive relief or recovery of money damages in this action, and such claims are hereby dismissed as a matter of law."

He had previously stated in his memorandum opinion (A-24):

> "There can be no claim for money damages for a violation of Section 7 [of the Clayton Act]."

3M's motion to dismiss, now before this Court in No. 291, reads (11a, Third Circuit Appendix):

> "Defendant, Minnesota Mining and Manufacturing Company hereby moves as follows:
>
> "1. That the complaint herein be dismissed pursuant to Rule 12(b) for failure to state a claim upon which relief can be granted or that summary judgment in favor of this defendant against the plaintiff be entered pursuant to Rule 56(b) * * *."

3M's petition for certiorari states (p. 14):

> "Plaintiff rests solely upon only one aspect of the charge made by the FTC in Docket 7973—that 3M's ultimate acquisition of IWI, following seven prior acquisitions in the electrical insulation field, might tend to lessen competition in violation of Section 7 [of the Clayton Act]."

Thus, underlying that entire case, in which this Court has requested the views of the Solicitor General in addition to the arguments to be presented on the merits by the parties, is the question of the sufficiency of a complaint for money damages under Section 7. This Court's desire to be fully informed may reflect a realization that from January 1, 1955 until January 1, 1963 the Department of Justice filed 68 cases under Clayton 7, and of those cases only 16 also alleged violations of other antitrust laws. A. B. A. Section of Antitrust Laws, *Merger Case Digest*, (1963).

Since Section 7 has increasingly become the principal means for government enforcement of the antitrust laws,

it is to be expected that private actions to promote enforcement in the public interest and to secure remedies for damages to private interests should likewise increase. The opinion of the Court of Appeals for the Third Circuit expressly sustained the complaint of New Jersey Wood Finishing Co. for money damages under Section 7, as well as under the Sherman Act, stating (332 F. 2d at 360):

> "Finally, 3M claims that even if the FTC proceeding tolled the statute of limitations, it preserved only the Clayton counts and the Sherman counts are barred. The statutory language of Section 5 (b) tolls the statute as to 'any matter complained of' in the Government suit. One of the overt acts upon which N. J. Wood's conspiracy count was based was the acquisition of IWI by 3M. While 'contract or conspiracy' was not at issue before the FTC, the acquisition of IWI was. N. J. Wood's complaint alleges that this act of acquisition was in furtherance of a conspiracy to 'restrain competition and to monopolize trade.' There was a 'substantial identity of subject matter.' Union Carbide and Carbon Corporation *v.* Nisley, 300 F. 2d 561, 570 (10 Cir. 1962). We, therefore, hold that the acquisition of IWI was a 'matter complained of' within Section 5(b) and that the statute of limitations was tolled as to the Sherman as well as the Clayton counts.' Union Carbide, supra; Steiner *v.* 20th Century-Fox Film Corporation, 232 F. 2d 190, 196 (9 Cir. 1956)."

Indeed, even in the Southern District of New York where this *Gottesman* case is pending, District Judges have continued to assume the validity of a claim for money damages for violation of Section 7. In *Ames Co. et al* v. *Bostich, Inc.* (S. D. N. Y. No. 62 Civ. 1) the District Judge, in granting a protective order in connection with interrogatories stated (September 23, 1964):

> "This is an action brought under Clayton Act, Section 7 (15 U. S. C. § 18) which seeks treble damages in the amount of $3,600,000 and injunctive relief based on an alleged violation of the United States antitrust laws by the defendant arising out of the defendant's acquisition in 1961 of the assets of Calwire, Inc., and Calnail, Inc., two affiliated California corporations engaged, respectively, in the manufacture and sale of heavy duty pneumatic nailing and stapling equipment." (Not officially reported, CCH Trade Cases ¶71,248)

Likewise in the Southern District of New York, Judge McLean's decision in *General Plywood Corp. v. U. S. Plywood Corp.* discloses a complaint for damages based squarely upon violation of Section 7 of the Clayton Act. (Not officially reported, CCH Trade Cases ¶71,117.)

The Court in *Utah Gas Pipeline Corp. v. El Paso Natural Gas Co., et al.* (D. C. Utah, Central Division, No. C 106-63, September 24, 1964 (Not officially reported, CCH Trade Cases ¶71,252) has taken specific note of the decision below in this *Hottesman* case and has declined to rule as to the sufficiency of that particular complaint "until the allegations of the complaint with reference to Section 7 are further brought into focus." That District Court further noted the conflict between this *Hottesman* case and the *Hall* case (No. 291), as well as language in *Highland Supply Co. v. Reynolds Metals Co.* (8 Cir. 1964), 327 F. 2d 725, which might be construed to deny a right of action for money damages.

A further intervening circumstance of substantial and persuasive importance is the decision of the Court of Appeals for the First Circuit in *Haverhill Gazette Co. v. Union Leader Corporation*, 333 F. 2d 798 and 333 F. 2d 808*. That case drew the distinction, which we sought to

* Certiorari pending, No. 502.

make in our petition and in our reply brief, between mere injunctive relief and a claim for actual damage, for the Court there said (333 F. 2d at 802):

> "In a private antitrust action liability and damages are not separate. Granting that an injunction may require a finding of merely threatened loss, 15 U. S. C. §26, a partial decree on all issues of liability, however considered, implies much more. One cannot think of private liability for violation of the antitrust laws except in terms of impact and damage."

The First Circuit relied upon the classic expression by Mr. Chief Justice Stone in *Bigelow, et al* v. *R.K.O. Radio Pictures, Inc. et al*, 327 U. S. 251, which so clearly distinguished between the burden of proof to show liability and the burden of proof required to show damage. It could likewise have relied upon what this Court said last term in *Simpson* v. *Union Oil of California*, 377 U. S. 13:

> "We disagree with the Court of Appeals that there is no actionable wrong or damage if a Sherman Act violation is assumed."
>
> * * * * * *
>
> "There is actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market; and it matters not that the complainant may be only one merchant."

Mr. Chief Justice Stone in the *Bigelow* case stated for the Court (327 U. S. at 265):

> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See Package Closure Corp. *v.* Sealright Co., 2 Cir., 141 F. 2d 972, 979. That principle is an ancient one. Armory *v.* Delamirie, 1 Strange 505, and

> is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application. In cases of collision where the offending vessel has violated regulations prescribed by statute, see The Pennsylvania, 19 Wall. 125, 136 * * *."

Since the decision herein prevents the proof of either "impact" or "damage" under Clayton 7, it is manifestly repugnant to the First Circuit's intervening decision in the *Haverhill Gazette Co.* case, *supra,* which is squarely and firmly grounded upon this Court's decision in *Bigelow, supra.* In the light of the intervening *Haverhill Gazette* case the Court might well desire to consider again what we stated in our reply brief (p. 7):

> "It would be a statutory anomaly indeed which provides for the atrophy of private actions under the very law which was enacted to encourage them, and which blocks proof of damage in private actions while providing treble damages. While the public right of action may be sustained by 'probability', damage inflicted by du Pont, caused by violation of Section 7 and while in violation thereof, creates the private right of action. Probability must be construed to precede actual damage, not to preclude it."

The granting by this Court of the petition for certiorari in the 3M case (No. 291) means that as a first step to deciding that case, this Court must determine the sufficiency of a complaint alleging money damages under Section 7 of the Clayton Act. Petitioners Gottesman et al. seek relief which establishes the initial and underlying premise of that case; namely, that a private party claiming to be injured by violation of Section 7 of the Clayton Act may obtain money damages therefor, and is not restricted merely to

declaratory or prospective relief. (See *J. I. Case, et al.* v. *Borak*, 377 U. S. 426). The determination of this point of law, in the light of the criteria set forth in the *Bigelow* case, should most appropriately be determined where this Court has already adjudicated that violation of the Clayton Act "led" (past tense) to "insulation" of the market, and where this Court ordered divestiture as the "competition restoring" remedy which would be "effective to redress the antitrust violation proved". (Gottesman petition, No. 120, p. 21).

This Court had Minnesota Mining and Manufacturing Co.'s petition before it following an interlocutory appeal under 28 U. S. C. 1292(b), just as this Court determined *J. I. Case* v. *Borak*, *supra*, and as the First Circuit determined the *Haverhill Gazette* case, *supra*, after interlocutory appeal. In this Gottesman case the District Judge likewise made the requisite certificate, but leave to appeal was denied, and six of the eight active Judges disqualified themselves upon petition for rehearing *en banc*. We submit that the intervening circumstances referred to above emphasize more strongly than we could do in our petition the importance of this Court's determination of appropriate criteria for review under Section 1292(b).

Conclusion.

For the foregoing reasons and those set forth in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that this Court postpone determination of this petition for rehearing until consideration on the merits of *Minnesota Mining and Manufacturing Co.* v. *New Jersey Wood Finishing Co.* (No. 291, October Term 1964) and thereafter that a writ of certiorari issue

to review the decision of the United States Court of Appeals for the Second Circuit in this case as prayed for in the petition filed May 27, 1964 herein.

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November 12, 1964

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

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